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No. 94-810

In The

Supreme Court of the United States

October Term, 1994

ROY B. TAYLOR SALES, INC.,

Petitioner,

v.

HOLLYMATIC CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Should this Court issue a writ of certiorari to reconsider the Court of Appeals' decision that it is not a *per se* violation of the antitrust laws to replace a poorly performing exclusive dealer who for two years had excluded the manufacturer from selling patty paper in its territory?

RULE 29.1 LIST

Respondent Hollymatic Corporation has no parent corporations or non-wholly owned subsidiaries.

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BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

Respondent, Hollymatic Corporation ("Hollymatic"), respectfully requests that this Court deny the Petition For Writ Of Certiorari, seeking review of the Court of Appeals' unanimous opinion in this case. That opinion is reported at 28 F.3d 1379 (5th Cir. 1994) (Higginbotham, J.).

STATEMENT OF THE CASE

A. Disposition In Courts Below

Petitioner Roy B. Taylor Sales, Inc.'s ("Taylor") Statement of the Case incorrectly and incompletely describes the disposition of the proceedings in the Court of Appeals. The unanimous opinion reversing the judgment of the district court carefully and thoroughly examined the entire record for facts demonstrating anticompetitive conduct and found none. Taylor instead quarrels with the Court of Appeals' determination that, even if Taylor could have demonstrated that Hollymatic terminated Taylor for not using its best efforts to sell both Hollymatic patty machines and paper, which Taylor characterized as a "tie", Hollymatic's action was procompetitive, because it increased consumer choice by ensuring that Hollymatic patty paper would be available to consumers. Pet. Apx. at 10. This Court, however, has no need to address the Questions Presented by Taylor's Petition because the court found that there was no evidence in the record of any injury to competition or to Taylor caused by a violation of the antitrust laws.

The Court of Appeals found no evidentiary basis in the record for Taylor's antitrust claims, including its tying claim. For example, Taylor did not submit any evidence defining the market in which Hollymatic supposedly wielded power. *Id.* at 16. Indeed, the record confirmed that the "Hollymatic Patty Machine" that Taylor alleged at trial to be the tying product for which Hollymatic possessed market power "does not exist." *Id.* at 17. Nor did Taylor introduce any evidence demonstrating the "strength and scope of competition" for those

Hollymatic machines that did exist. *Id.* at 18. The Court of Appeals found no guidance as to the geographic market or the product market at issue from the evidence Taylor offered at trial. The Court of Appeals also noted "[i]mportantly, there was no evidence of significant barriers to entry." *Id.* at 20. In sum, the Court of Appeals found that "Taylor offered no direct evidence that Hollymatic could control prices in the market for patty machines or for any particular machine, and offered no evidence of Hollymatic's share in either market." *Id.* at 20.

The Court of Appeals also found no evidence of "an actual adverse effect on competition." *Id.* at 13. Taylor's allegations of supracompetitive prices were found to be no more than "speculation," disproved by Taylor's own evidence. *Id.* at 14. Consequently, the Questions Presented as framed by Taylor's Petition assume facts not supported by the record in this case and are merely designed to obscure Taylor's purpose of asking this Court to review the record to determine whether the Court of Appeals properly reversed on the basis of Taylor's numerous evidentiary failings.

Given the paucity of Taylor's evidence at trial, the Court of Appeals was able to pass over a number of otherwise dispositive grounds for reversal without the necessity of ruling on them. Thus, the Court of Appeals had no need even to address such issues as whether Hollymatic ceased doing business with Taylor because Taylor was selling the products of other companies, whether a tying arrangement even existed (given the lack of coercion and distinct products), and whether the district court committed reversible error in instructing the

jury. Pet. Apx. at 4-5. Although the Court of Appeals initially assumed a theoretical "tie," upon closer analysis, the Court of Appeals found that, at best, the record might establish something similar to "an exclusive-dealing agreement" rather than a tying agreement. *Id.* at 12.

The *only* issue presented by this case is whether it is a *per se* violation of the antitrust laws to terminate a poorly performing exclusive dealer who for two years had excluded Hollymatic from selling patty paper in its territory. All of the Courts of Appeals that have looked at the issue have uniformly answered no.

B. Statement Of The Facts

The record more than confirms the Court of Appeals' conclusions regarding the absence of facts demonstrating an antitrust violation in this case. Although currently positioned as a tying claim, Taylor never alleged anything more than the typical "jilted distributor" case which has been repeatedly rejected by federal courts as a basis for antitrust liability. Hollymatic's decision to replace Taylor with a more aggressive distributor was manifestly pro-competitive.

Taylor was Hollymatic's exclusive distributor in the sense that Taylor provided Hollymatic's only access to the market in Taylor's sales territory. Taylor did not carry Hollymatic's products exclusively, although it agreed to use its "best efforts" on behalf of Hollymatic. Pet. Apx. at 2. Best efforts were required if Hollymatic was to compete effectively.

Although Hollymatic offered well-engineered products, Hollymatic was hardly a dominant supplier of food processing equipment, patty machines or patty paper. Hobart is the dominant competitor in the sale of food processing equipment in the United States and often described as the "giant" of the industry. The other major competitors include Formax, Patty-O-Matic, NuTEC, Bridge and Koppens. Hollymatic's market position had been steadily eroding over the years. For many years fast food outlets had been major customers for Hollymatic, with three key accounts being McDonalds, Burger King and Wendy's. All three of these customers were lost to Formax. The loss of Wendy's alone "flood[ed] the market" with used machines, which, as the record shows, were a major competitive factor. During the relevant time period, Wendy's placement of nearly 3,500 used Hollymatic machines on the market caused Hollymatic's sales of new machines to drop by over 500 units per year.

The uncontradicted evidence in the record showed that the market for patty paper was "extremely competitive". Hollymatic's main competitors in the sale of patty paper were Formax, Framarx, James River and Schwab. The patty paper for Hollymatic machines is interchangeable, and customers can indiscriminately switch to preferred brands.

Patty paper users who regularly use a high volume of paper buy in large bulk amounts based primarily on price. Such bulk sales were usually at low prices, with Hollymatic and its dealers receiving low margins. To compete for this business, Hollymatic had a national competitive allowance program in which Taylor refused

to participate because at times Taylor's margin could be as low as 4% when it insisted upon at least a 25% margin.

Small customers, buying one or a few boxes of patty paper at a time, purchased patty paper primarily on nonprice factors, including ease of delivery, convenience and service. These customers tend to buy from dealers that offer, as part of patty paper sales, either free service on equipment (or at least service at reduced labor rates), quicker delivery, better service or the ability to inventory the paper for smaller accounts until needed.

Despite Hollymatic's need for aggressive marketing of the patty machines and paper, Taylor failed to use its best efforts to sell Hollymatic products. Taylor was terminated, as the record showed, because it was a poor dealer. Taylor sold few Hollymatic machines. Its sales of machines were continuing to drop, even after repeated warnings. In a rapidly changing market and with deteriorating sales, Taylor only maintained one outside sales person for an exclusive territory of 150,000 square miles. Taylor had decided to build its business solely around its servicemen and concentrate on small accounts and Taylor had abandoned all efforts to sell to processing and packing plants, meat packers, and central commissaries. It is no wonder that Taylor was a low-volume dealer with downward trending sales. Indeed, although the Petition now identifies the Hollymatic Super Patty Machine as the tying product, Taylor's sales of such machines were *de minimus*. Taylor sold only 12 Super Patty Machines over the last five years of its distributorship, an average of just 2.4 machines per year. (The total profit to Taylor was less than $3,000 per year from these sales.)

Taylor was a problem dealer in many other respects. Its credit was bad, and Hollymatic consequently had to repeatedly deal with past due accounts. It refused to cooperate with Hollymatic's national sales program, failing, for example, to install equipment purchased by a U.S. Air Force base in its exclusive territory. It even went so far as to lie to the government, saying it had not been paid by Hollymatic to install the equipment when it had. Taylor also performed erratically in other respects, such as purchasing counterfeit parts for resale as part of its service operation.

The Court of Appeals correctly recognized that Taylor continuously misstated and confused statistical facts and statements. Although Taylor in its Petition now claims that in its territory the Super Patty Machine "represented 95% of the sales for machines of that size," the Court of Appeals observed that "Taylor does not specify the percentage of sales attributable to the Super Patty Machine in any market or provide any basis for even a rough estimate of such a figure, nor does Taylor recount information useful in assessing the strength and scope of competition for the Super Patty Machine." *Cf.* Pet. at 15 and Pet. Apx. at 18 (footnotes omitted).[1]

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[1] As the Court of Appeals noted, contrary to what Taylor says in its Petition, all that Taylor's evidence showed was that Taylor had 95% of the patty machine business of its existing customers. *Id.* at 20. This, as the Court of Appeals observed, shed no light on what percentage of sales in the patty machine market was attributable to the Hollymatic Super Machine or any other Hollymatic machine. *Id.* at 18.

With respect to the sale of Hollymatic patty paper, Taylor's conduct was even more anticompetitive. Although Hollymatic had been forced to increase prices due to rising raw material costs, many customers continued to purchase Hollymatic patty paper because of, among other factors, Hollymatic's superior services and prior relationships, speed of delivery, and savings on labor costs. Taylor, however, refused to participate in Hollymatic's competitive rebate program and refused to cut margins at all to retain customers. (As Taylor admits, however, rebates were only necessary in 4% of sales, indicating most Hollymatic customers' recognition of the added value provided by Hollymatic's services.) In September of 1988, almost two years before Taylor was terminated, Taylor secretly ended its purchases of Hollymatic patty paper.

Instead of buying Hollymatic patty paper, Taylor secretly became the distributor of Formax's Shur Quality patty paper. Pet. at 7. Thus, Hollymatic's exclusive dealer intentionally excluded Hollymatic entirely from the patty paper market in its 150,000 square mile territory and instead became the distributor for Formax – the same major competitor that had pushed Hollymatic patty machines out of McDonalds, Burger King, and Wendy's. The record in this case thus overwhelmingly demonstrates – and, as it must, the Petition effectively admits – that Taylor breached its "best efforts" agreement with Hollymatic. Pet. at 7.

The record shows that Hollymatic increased competition in patty paper when it terminated Taylor. Taylor

continued selling its other lines of products, new Hollymatic machines purchased from other dealers, used Hollymatic machines, and the same Shur Quality Formax paper it had been selling exclusively for almost two years before it was terminated. Thus, the replacement of Taylor merely added a new Hollymatic dealer to the territory, permitting Hollymatic patty paper once again to be sold, and did not eliminate any competitor.

Taylor's new theory of antitrust injury apparently is that Hollymatic's insistence that Taylor aggressively sell all of Hollymatic's products allowed Hollymatic to obtain a supracompetitive price for patty paper. The Court of Appeals found the record wholly lacking of any evidence of actual supracompetitive prices. The sole "evidence" for this claim was isolated testimony that Taylor knew of one customer who paid an $11.10 higher price for a case of patty paper or less than one-twentieth of one cent per sheet more for the same quantity of paper as another customer. This evidence says nothing regarding supracompetitive pricing, which the Court of Appeals found nonexistent. This pricing was based on Taylor's insistence on getting a 25% margin on its patty paper sales rather than participate in Hollymatic's competitive allowance program where appropriate. Moreover, the record was silent on whether the supposed customer paid the 1/20 of a cent higher price in return for free service, or to defray the cost of the dealer in carrying the inventory and giving prompt delivery of the small order at the customer's convenience.

Taylor freely admitted, as the record showed, that competition for patty paper sales was "fierce" and Hollymatic offered rebates on its patty paper to retain customers in the face of this stiff competitive pressure. Pet.

Apx. at 10. Taylor itself believed that Hollymatic always would provide competitive rebates if they were necessary to retain customers. Nevertheless, Taylor refused to participate in the competitive allowance program because Taylor felt that rebates reduced its own profit margin. It was Taylor's rejection of Hollymatic's competitive rebates, not its termination, that was anticompetitive.

The record does not support Taylor's claim of a meaningful tie, as the Court of Appeals clearly noted. Taylor's eventual focus on only one Hollymatic patty machine as the alleged tying product, the Super, demonstrates the lack of substance to its claim. Taylor claims that Hollymatic used the leverage of losing $3,000 to $6,000 per year in profit[2] to tie patty paper sales. Such dollar amounts are frivolous and not even *de minimus* for tying purposes. There could be no better proof of why there was a complete lack of market power than the fact that Taylor, beginning two years before its termination, stopped buying Hollymatic patty paper, refused to buy it at the time of termination, and continued to buy Formax paper after its termination. In short, the record shows there was never a tie.

Based on Taylor's poor performance as a Hollymatic dealer, Hollymatic severed relations and replaced Taylor with a new dealer. Hollymatic's new dealer did participate in Hollymatic's competitive allowance program and competed with Taylor and Formax. Taylor's only complaint is not that its potential customers were unable to

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[2] During the five years before its termination, Taylor's average profit, on sales of 2.4 Supers per year, was $3,000 and its highest profit for any of the years was $6,000.

buy whatever brand of patty paper or food processing equipment they chose at competitive prices, but rather that Taylor lost money because it could no longer keep Hollymatic from competing with it in the sale of Formax patty paper. Taylor continued to compete and then filed suit to recover alleged lost profits resulting from its termination. Pet. Apx. at 4.

REASONS FOR DENYING THE WRIT

This case presents no record for reconsidering the requisites for *per se* illegality articulated by this Court in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). None of the three "Questions Presented" by the Petition satisfy this Courts' criteria for granting a Writ of Certiorari, nor do they even demonstrate an error on the part of the Court of Appeals. Taylor's argument – that the Court of Appeals should have focused on the injury done to the terminated dealer – improperly diverts the analysis away from consumers and competitive injury toward Taylor's alleged injury from termination. This analysis would leave no meaningful way of differentiating between *per se* illegal tying arrangements and procompetitive exclusive dealer arrangements. Indeed, Taylor's suggested standard would completely undermine the presumed legality of a host of vertical nonprice restraints currently assessed under the rule of reason. *See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54, 57-58 (1977).

Given that none of Taylor's three "Questions Presented" are supported by the facts of this case or the law,

and no conflict in the federal appellate courts is indicated, the Petition should be denied.

I. PETITIONER'S TYING CLAIM WAS NOT SUPPORTED BY FACTS IN THE RECORD

Contrary to its Petition, Taylor lost below for want of evidence, not because the Court of Appeals decided to divest dealers of potential antitrust remedies. Critical elements necessary to establish an unlawful tying arrangement simply lacked any factual support in the record.[3] The Court of Appeals' decision was confined to the facts of this case.

This Court has held that *per se* condemnation of an alleged tying arrangement "is only appropriate if the existence of forcing is probable." *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 15 (1984). Thus, a tying arrangement is only *per se* unlawful where, at a minimum: (1) the seller conditions the sale of the tying product on the purchase of the tied product; (2) two distinct products are involved; (3) the seller has market power in the tying product; and (4) the arrangement affects a substantial amount of interstate commerce in the tied product market. *Id.* at 9, 12-18. In addition, a plaintiff must demonstrate both anticompetitive injury and that the injury flowed from the anticompetitive act in order to recover treble damages for an alleged violation.

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[3] This was not surprising given the number of different and sometimes conflicting theories of liability that Taylor presented as the case progressed. *See, e.g.*, Pet. Apx. at 17 n.43.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

Taylor's initial "Question Presented" contains at least three unsupported assumptions: (1) that a tying arrangement was imposed on Taylor; (2) who was terminated for refusing to purchase a tied product; (3) at supracompetitive prices. In actuality, the Court of Appeals did not find that Taylor proved either a tying arrangement or the basis for its termination. Moreover, the Court of Appeals specifically held that Taylor did not establish supracompetitive pricing.

Obviously, Taylor could not prove a tying case without establishing market power in a tying product. Yet, the Court of Appeals found that Taylor introduced no evidence at all of Hollymatic's alleged market power. Indeed, the Court of Appeals could not even identify a tying product. The Court of Appeals also found no substantial potential for impact on competition. Absent such proof, in this case, the Petition's Questions Presented need not and cannot be reached. Simply put, they have not yet been posed. In essence, the Petition seeks an advisory opinion unsuitable for a writ of certiorari. *See SS Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("Resolution here . . . can await a day when the issue is posed less abstractly.").

In an attempt to demonstrate antitrust injury, the Petition raises the spectre of supracompetitive pricing. Pet. at 8, 12, 15. Contrary to the Petition's implications, the Court of Appeals found no evidence of "supracompetitive prices" for Hollymatic patty paper. Pet. Apx. at

14 ("The record does not indicate that consumers continued to purchase Hollymatic patty paper at prices above the market."). Although some pricing differentials existed in various paper markets, the Court of Appeals recognized that Hollymatic cut prices to meet or beat its competition. Taylor even acknowledged that Hollymatic had offered competitive allowances which Taylor rejected. In addition, several nonprice factors were important to consumers' perception of value, including convenience, reduced inventory levels, free service and timely deliveries. Absent accounting for these value added factors, cost comparisons would prove nothing.

In sum, the Court of Appeals found that the factual assertions that are repeated in Taylor's Petition were unsubstantiated in the record. What Taylor really wants is for this Court to sift the record to determine whether there was any factual foundation for a *per se* tying claim. It is not, however, the task of this Court to perform a factual review of a record already perused by the appellate court. *See, e.g., United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

A. There Was No Evidence Of Sufficient Market Power In The Market For The Tying Product To Appreciably Restrain Competition In The Tied Product

The record readily rebuts Taylor's complaint that the Court of Appeals ignored the evidence of tying in this case. Although this Court held in *Jefferson Parish* that

market power in the tying product is a prerequisite for *per se* tying liability, the Court of Appeals found the record barren of evidence of market power of any sort. Taylor failed to introduce evidence defining the relevant geographic or product markets at all. Not only was there no evidence of market power, Taylor failed to even identify a tying *product*. Consequently, the record in this case will not support the theoretical baggage that Taylor continues to append to it. *See, e.g., Breaux Brothers Farms, Inc. v. Teche Sugar Co., Inc.*, 21 F.3d 83 (5th Cir.), *cert. denied*, 130 L.Ed. 2d 339 (1994).

The lack of evidence concerning the relevant product market was compounded by Taylor's failure to identify a tying product. Prior to trial, Taylor betrayed the theoretical deficiency for its tying claim by confusing its Hollymatic *franchise* with a tying product. Taylor's attempt at trial to "redefine" the tying product as the "Hollymatic Patty machine" was found to be equally spurious. As the Court of Appeals recognized, no such machine even existed. Pet. Apx. at 17.

In its Petition, Taylor belatedly identifies only one of Hollymatic's patty machines, the Super Patty Machine, as the tied product. Taylor's current decision to call the Super a tying product, however, does not establish market power for that product. As noted above, Taylor's sales averaged only 2.4 Super Patty Machines a year in its 150,000 square mile territory. There was no evidence that the Super was dominant in any market, *especially Taylor's*. On the contrary, competitors such as Formax had introduced sophisticated, high-volume machines that captured an increasing share of the market as fast food franchises

centralized processing operations. Moreover, the evidence indicated that, as the equipment market moved away from smaller machines like the Super, used Supers flooded the market, undercutting Hollymatic's ability to sell new machines.

Nor was there anything unique to Hollymatic machines that would serve to tie consumers to purchasing Hollymatic patty paper. *Cf. Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072, 2087 (1992) (acknowledging theoretical potential for market power where consumers are "locked into" a single product line). Patty machines and patty paper are interchangeable. Thus, even those consumers who purchased a Hollymatic Super Machine would not be "locked into" Hollymatic patty paper.[4] In fact Taylor's real complaint is that Hollymatic's new dealer was cutting margins on patty paper sales to take customers away from using Formax patty paper sold by Taylor and to get them to use Hollymatic paper. This is the essence of price competition, not tying.

Absent evidence of market power in a tying product, this case is revealed for what it always was: a typical

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[4] Although Taylor also failed to identify the relevant geographic market, the Court of Appeals assumed, for the sake of argument, that Taylor's distribution territory was the relevant market area. This assumption did not satisfy Taylor's burden of proof at trial, however. Moreover, without reference to the overlapping markets for Hollymatic's competitors, this assumption can be questioned. In addition, Taylor introduced no evidence regarding customer differentiation within the assumed market. Consequently, Taylor failed to satisfy a threshold requirement for establishing market power.

situation involving a distributor terminated for poor performance. Taylor's ever-mutating tying allegations had no basis in fact or law and no other distributor is affected by the outcome of Taylor's case.

B. No Substantial Amount Of Commerce In The Allegedly Tied Product Was Foreclosed

In *Jefferson Parish*, this Court recognized that a "substantial potential for impact on competition" must exist in order to justify *per se* condemnation. 466 U.S. at 16 ("If only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law."). Here, no customers were forced. *Cf.* Pet. at 14, 16. As previously noted, the Court of Appeals found that Taylor could not demonstrate that commerce was foreclosed in the allegedly tied product because the complained of conduct actually *increased* availability of patty paper to customers. As long as Taylor sold Hollymatic patty paper, customers had the option of purchasing Hollymatic patty paper or that sold by any of its competitors. Pet. Apx. at 6 ("Customers purchasing patty machines from Taylor remained free to buy paper elsewhere.").

Hollymatic was a relatively minor player in the patty machine and paper markets and was dependent on Taylor, as the only distributor in its territory, to ensure Hollymatic's access to the ultimate consumer. Ironically, Taylor's continued refusal to stock and sell Hollymatic patty paper effectively eliminated *Hollymatic's* access to the patty paper market and limited consumer choice.

Including Hollymatic, there were at least five competing patty paper suppliers in Taylor's territory. The record established that "competition in patty paper sales was fierce, and that Hollymatic was dependent on Taylor's aggressive efforts to move its product." Pet. Apx. at 10. The Court of Appeals therefore was compelled to conclude that "[u]nder these circumstances, any obligation on Taylor to carry only Hollymatic's patty paper would have enhanced competition by ensuring Hollymatic access to the market." *Id.*

Taylor, however, balked at carrying Hollymatic patty paper, preferring to stock the major competitor's brand. Hollymatic offered competitive allowances in an effort to encourage Taylor to meet its competition, but Taylor held out for larger, across-the-board price breaks. This was to increase Taylor's margins, not competition. In sum, the only foreclosure of commerce in the allegedly tied product occurred when Taylor blocked *Hollymatic's* access to the patty paper market for two years by substituting the product of a competitor. On the other hand, Taylor's own evidence demonstrated that the patty papers of Hollymatic's competitors were "always available" to end users in Taylor's territory. Pet. Apx. at 10. Accordingly, Hollymatic's alleged conduct could not have foreclosed any commerce at all in any brand of patty paper and impacted only one dealer, by increasing competition.

C. The Record Adduced No Evidence Of Antitrust Injury

Taylor implicitly assumes that it can recover if it proves a *"per se"* tying arrangement even if it fails to

establish antitrust injury. Taylor's alleged injury was not based on the existence of the alleged tying arrangements arising out of its 1970 and 1979 agreements with Hollymatic, however, but out of its own termination as a Hollymatic distributor.[5] Had Taylor agreed to aggressively distribute Hollymatic patty paper with the rebates and lower prices, the arrangement would have increased competition rather than restrained it by maintaining Hollymatic as a competitor in the market. In at least three separate cases, this Court has found no viable antitrust claim because the plaintiff's injury resulted from heightened competition rather than a restraint on competition. *Brunswick*, 429 U.S. at 488-89; *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116-17 (1986); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 346 (1990).

Taylor attempts to identify anticompetitive injury by theorizing that customers were forced to pay supracompetitive prices for Hollymatic patty paper. Pet. at 14-17. The Court of Appeals easily saw through Taylor's allegation of supracompetitive pricing as nothing more than "speculation." Pet. Apx. at 14 (citing *Jefferson Parish*, 466 U.S. at 29-30). "Supracompetitive pricing entails a restriction in output." *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2593 (1993); *see also Stamatakis Indus., Inc. v. King*, 965 F.2d 469, 471 (7th Cir. 1992) (antitrust injury only results from reduced output

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[5] Since Taylor could still buy new Hollymatic equipment from other dealers and used Hollymatic equipment, as well as Formax patty paper, its real complaint is merely that, by being terminated, its margins were cut because it then faced competition from the new Hollymatic dealer.

or increased consumer prices). Taylor can point to no such restraints in the patty paper markets except Taylor's own decision to limit access to Hollymatic's paper.

There simply was no evidence of Hollymatic's ability to "force" patty paper on consumers. Although, like any manufacturer, Hollymatic had the ability to raise its own prices, the record demonstrated that competitors successfully undercut Hollymatic's price increases with those customers unconcerned with Hollymatic's superior services, such as available inventory and delivery times. As a result, Hollymatic soon reduced its own prices through competitive rebates in specific competitive situations. Throughout the relevant period, customers "always had a choice" of patty paper suppliers.

Taylor's supposition that other competitors would increase prices to follow Hollymatic's higher price is fanciful and lacks any basis in the record.[6] Competition was "fierce" with multiple competitors who were *already* undercutting Hollymatic's prices. Pet. Apx. at 10. As a result, Hollymatic lost some customers to competition.

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[6] Taylor speculates that Hollymatic's competitors would not inform consumers of their lower prices, citing *Eastman Kodak*. Pet. at 14. Taylor takes *Eastman Kodak's* concern over pricing information regarding "locked in" aftermarket sales out of context by applying it to the patty paper market, where no consumer is locked into a particular brand. *Cf.* 112 S. Ct. at 2086 n.21; *Lee v. Life Ins. Co. of North America*, 23 F.3d 14 (1st Cir.), *cert. denied*, 130 L.Ed.2d 340 (1994) (tying claim based on lock-in theory dismissed). In Hollymatic's case, a competitor need only advertise its own, lower, patty paper price in order to fully inform consumers of their existing options.

No evidence was introduced to indicate that these competitors would not undercut each other as readily as they would Hollymatic. The evidence establishing Hollymatic's need for competitive allowances also demonstrated that any competitor's sustained effort to increase prices would simply price that competitor out of the market. In fact, if what Taylor theorized could be true, Taylor would still be unable to show an antitrust injury. Taylor continued to sell Formax patty paper after its termination and if Hollymatic sought supracompetitive prices after Taylor's termination, Taylor could merely undercut Hollymatic and keep all the customers. Thus, the termination of Taylor could not restrain competition.

As recognized by the Court of Appeals, Hollymatic's actions were taken to increase competition in the market for patty paper. Pet. Apx. at 10. Taylor's complaint simply echoes that of any other distributor who is replaced in an effort to obtain a more aggressive competitor. *See, e.g., R.W. Intern. Corp. v. Welch Food, Inc.*, 13 F.3d 478 (1st Cir. 1994) (termination of dealer found procompetitive); *Lovett v. General Motors Corp.*, 998 F.2d 575 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1058 (1994). The Court of Appeals examined the factual and legal underpinnings of Taylor's claim of competitive injury and found them nonexistent.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS

Rule 10.1(a) of this Court lists, as the first "special and important" reason for granting a writ, the rendering of ". . . a decision in conflict with the decision of another United States court of appeals on the same matter." Taylor does not contend that any federal appellate court has

rendered a decision conflicting with the one at bar. The Fifth Circuit itself gave no indication whatsoever that its ruling conflicted with that of any other circuit. *See Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-93 (1923) (where circuits "were really in harmony, and not in conflict," then "there was no ground for our allowing the writ of certiorari to add to an already burdened docket"). Moreover, to the extent that Taylor poses a theoretical question not presented by this record there is no occasion to decide it. *See State of Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950) ("[i]t may be desirable to have different aspects of an issue further illumined by the lower courts" before granting certiorari).

In particular, the Court of Appeals noted that Taylor's allegations were analogous to those the Tenth Circuit addressed and rejected in *Smith Machinery Co., Inc. v. Hesston Corp.*, 878 F.2d 1290 (10th Cir.), *cert. denied*, 493 U.S. 1073 (1990). *Smith Machinery* also dealt with allegations that a manufacturer conditioned sale of certain equipment to its distributor on its purchase of other equipment. Both courts recognized that these allegations did not establish an illegal tie because the "line forcing" did not foreclose choice to the ultimate consumer. Indeed, both courts recognized that the allegations were more closely analogous to "exclusive dealing agreements," which do not invoke *per se* liability. *See Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 393-94 (7th Cir. 1984) (exclusive dealing agreements requiring dealer to sell only manufacturer's product line assessed under rule of reason analysis). One need look no further than to

Taylor to see that substitute goods, such as Formax patty paper, were always available.

Federal appellate courts repeatedly are faced with terminated distributors who raise defective antitrust claims in an effort to obtain treble damages. *See, e.g., Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 807-08 (6th Cir. 1988) (rejecting claim which implicitly suggested adopting a *per se* test of illegality for situation in which manufacturer "jilts" its distributors in favor of new exclusive distributor); *Famous Brands, Inc. v. David Sherman Corp.*, 814 F.2d 517, 524 (8th Cir. 1987) (affirming summary judgment for defendant on tying claim, holding "[t]here is no illegal concert of action if Sherman simply substituted Premier for Famous in an attempt to find a more active distributor of Sherman's products"); *Unijax, Inc. v. Champion Intern., Inc.*, 683 F.2d 678, 685 (2d Cir. 1982) (judgment n.o.v. affirmed where evidence merely established manufacturer was dissatisfied with dealer's performance and "threatened to cease supplying the company unless sales were increased").

Similarly, in this case, Taylor's actual complaint was that Hollymatic replaced it as a distributor of Hollymatic products because it did not aggressively distribute Hollymatic patty paper. As noted by the Tenth Circuit in *Dreiling v. Peugeot Motors of America, Inc.*, 850 F.2d 1373, 1381 (10th Cir. 1988), "[t]he substitution of one distributor for another is not manifestly anticompetitive." The Tenth Circuit rejected the alleged tying claim after finding that "[t]he record contains no evidence that the dealer replacement would reduce competition in either manufacturing or sales." *Id.* The Ninth Circuit also has agreed in this context that, where a supplier seeks no more than an

aggressive distributor for his product, his conduct may be more beneficial than detrimental to competition and does not constitute an antitrust violation. *See, e.g., Dreibus v. Wilson,* 529 F.2d 170 (9th Cir. 1975).

Although several courts of appeal have addressed tying cases brought by dealers in recent years, none of these decisions have diverged with that of the case at bar. The majority of these cases have ended in summary judgment for the defendant manufacturer on various grounds. *See, e.g., Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.,* 959 F.2d 468 (3d Cir.), *cert. denied,* 113 S. Ct. 196 (1992) (defendant lacked requisite power in the tying product market to be subject to *per se* tying liability); *Suburban Propane v. Proctor Gas, Inc.,* 953 F.2d 780, 788-89 (2d Cir. 1992) (dealer failed to prove manufacturer had the market power necessary to render alleged tie illegal); *Amerinet Inc. v. Xerox Corp.,* 972 F.2d 1483, 1500-01 (8th Cir.), *cert. denied,* 113 S. Ct. 1048 (1993) (dealer failed to prove explicit conditioning necessary for tying arrangement). Consequently, there is no need for this Court to intervene by granting the requested writ.

III. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S ANALYSIS OF ALLEGED TYING CLAIMS

Nor did the Court of Appeals' analysis deviate from the settled principles employed by this Court for the resolution of antitrust cases. Contrary to Taylor's advocacy of a blanket extension of *per se* liability, this Court has recognized that only "certain" tying arrangements are subject to *per se* liability. *Jefferson Parish,* 466 U.S. at 11

("not every refusal to sell two products separately can be said to restrain competition").

As demonstrated above, Taylor did not satisfy the elements of a *per se* tying case as set forth by *Jefferson Parish*. Nor did the Court of Appeals depart from the oft-repeated injunctions of this Court to examine justifications for departing from the rule of reason standard. As explained in *Jefferson Parish* (466 U.S. at 21 n.34):

> "[T]he legality of . . . conduct depends on its competitive consequences, not on whether it can be labeled 'tying.' If the competitive consequences of [an] arrangement are not those to which the *per se* rule is addressed, then it should not be condemned irrespective of its label."

Taylor's blanket approach to *per se* liability would overturn this established precedent with regard to vertical non-price restraints.

In addition, Taylor's proposed theory that Hollymatic can violate the antitrust laws without causing an injury to competition has been rejected by this Court. *See Brook Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993); *Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986). Taylor's failure to grasp this requirement is apparent from the second and third "Questions Presented" by the Petition. The second question asks "[w]hether a dealer subjected to a tying arrangement must show a substantial competitive effect upon the downstream consumer market in order to obtain relief under the antitrust laws?" This question was answered in *Jefferson Parish*, which held (466 U.S. at 16):

> "Of course, as a threshold matter there must be a substantial potential for impact on competition in order to justify *per se* condemnation. If only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law."

Therefore, absent a "substantial competitive effect" in the market where patty paper was sold, Taylor cannot establish a *per se* tying claim. Pet. Apx. at 14 ("The Supreme Court rejected [Taylor's] reasoning in *Jefferson Parish.*"). Indeed, absent such evidence, Taylor's termination cannot rise to the level of an antitrust injury. As Taylor admitted at oral argument in the Court of Appeals, there was no injury to its customers and its entire claim rests on the premise that any injury to Taylor is injury to competition. One need only look to this Court's recent decision in *Brook Group* to recognize that this is not the law. *Brook Group*, 113 S. Ct. at 2588-89.

The third of the "Questions Presented" similarly implies that the Court of Appeals incorrectly interpreted *Jefferson Parish* by focusing on the impact of the alleged tying agreement on "ultimate consumers" for Hollymatic patty paper. Yet, this analysis was consistent with *Jefferson Parish* in every respect and especially with regard to the effect on ultimate consumers. *Jefferson Parish* examined a challenge brought by an anesthesiologist against a hospital contract requiring all anesthesiological services at the hospital to be performed by a particular firm. Rather than focus on the harm to the anesthesiologist, the Court focused on the impact on *consumers*. 466 U.S. at 18 ("any inquiry into the validity of a tying arrangement

must focus on the market or markets in which the products are sold" and in which the forcing must have an impact). The Court concluded that the analysis must focus on the hospital's sale of services to *patients* rather than the hospital's arrangements with the *providers* of the services. *Id.* Reaching a conclusion entirely consistent with that reached by the Court of Appeals in this case, the *Jefferson Parish* Court found "this record contains no evidence that the hospital 'forced' any such services on unwilling patients." *Id.* at 28; *cf.* Pet. Apx. at 14 ("The record does not indicate that consumers continued to purchase Hollymatic patty paper at prices above market.").

Indeed, this Court has guarded carefully against allowing *per se* condemnation to attach as a matter of labeling. *See Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985) ("not all concerted refusals to deal should be afforded *per se* treatment"); *N.C.A.A. v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 99-101 (1984) (*per se* treatment of restrictions inappropriate despite obvious horizontal restraints on output where restraint was necessary to product availability); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979) (licensing restrictions necessary to make market). The Court of Appeals simply examined the arrangement established by the record to determine whether the alleged tie-in was likely to threaten anticompetitive harm and found no such potential.

Finally, Taylor incorrectly portrays the Court of Appeals as "ignoring" Taylor's evidence in order to apply

the rule of reason in a departure from *Eastman Kodak*. The Court of Appeals not only weighed Taylor's evidence fully, but did so under both a *per se* and a rule of reason analysis. The plaintiffs in *Eastman Kodak*, however, had waived their rule of reason tying claim below, leaving "only a *per se* claim before this Court." 112 S. Ct. at 2094 (Scalia, J., dissenting). Nothing in *Eastman Kodak* purports to overturn *Jefferson Parish's* dichotomy between *per se* and rule of reason tying claims and nothing in the record indicates that Taylor's evidence was ignored. To the contrary, after a thorough review of the record, the Court of Appeals concluded that Taylor's evidence contradicted Taylor's own theory of recovery.

CONCLUSION

For all of the reasons stated above, issuance of a writ of certiorari under such circumstances would be improvident. *See Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924); *Furness, Withy & Co. v. Yang-Tsze Insur. Assoc.*, 242 U.S. 430 (1917). The Petition for Writ of Certiorari should be denied.

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